IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7741

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL., AND THE BABCOCK & WILCOX COMPANY, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., and THE STATE OF NEW YORK, *Respondents*

PETITION OF BALTIMORE GAS AND ELECTRIC COMPANY, ET AL. AND THE BABCOCK & WILCOX COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Baltimore Gas and Electric Company, *et al.*[1] and The Babcock & Wilcox Company respectfully petition

[1] Boston Edison Company, Consumers Power Company, Duke Power Company, Long Island Lighting Company, Northeast Nuclear Energy Company, Pacific Gas & Electric Company, Philadelphia Electric Company, Public Service Electric & Gas Company, Southern California Edison Company, The Connecticut Light & Power Company, The Hartford Electric Light Company, Virginia Electric and Power Company, Western Massachusetts Electric Company, and Yankee Atomic Electric Company.

for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 26, 1976, as amended on August 12, 1976 and supplemented on September 8, 1976.

OPINIONS BELOW

The subject of this proceeding is an interim licensing policy of the Nuclear Regulatory Commission (the Commission), under which it decided to consider, in individual cases after full radiological health and safety and environmental reviews, whether to grant licenses relating to the use of mixed (uranium-plutonium) oxide fuel during the period prior to completion of its generic rulemaking proceeding on use of such fuel, the GESMO proceeding.[2] This policy was announced on November 11, 1975, published in the Federal Register on November 14, 1975 (40 Fed. Reg. 53056), and corrected in minor detail on December 19, 1975 (40 Fed. Reg. 59497, December 24, 1975). The notice and correction are set forth as Appendix A to the petition for certiorari filed in this proceeding by Allied-General Nuclear Services, *et al.*, on November 9, 1976, Supreme Court Docket No. 76-653.[3]

The Second Circuit's opinion reversing the Commission's interim licensing policy, *Natural Resources Defense Council, et al.* v. *Nuclear Regulatory Commission,*

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[2] See pages 4-10 *infra* for discussion of the subject of mixed oxide fuel and the NRC proceedings relating to it.

[3] That Appendix, as well as Appendices B, C, D and E to the petition filed by Allied-General Nuclear Services, *et al.*, is incorporated herein by reference. Appendices to the Allied-General Nuclear Services, *et al.*, petition will hereinafter be cited as "AGNS Appendix —."

as issued May 26, 1976 and amended August 12, 1976, is reported at 539 F.2d 824 and set forth as AGNS Appendix B. The Second Circuit's per curiam supplemental opinion denying rehearing, issued September 8, 1976, is not yet officially reported.[4] It is unofficially reported at 9 E.R.C. 1414 and set forth as AGNS Appendix C.

JURISDICTION

This petition for a writ of certiorari is being filed within the prescribed period of 90 days after September 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2350(a), and 42 U.S.C. § 2239(b).

QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act (NEPA), as construed by this Court in *Kleppe* v. *Sierra Club*, 96 S.Ct. 2718 (June 28, 1976), prohibits the Commission from granting any licenses relating to the commercial use of mixed oxide fuel in nuclear power reactors during the period prior to completion of the GESMO rulemaking proceeding, which has been pending since 1974 and may well take several additional years to complete.

2. Whether the Second Circuit erred in holding, in the absence of a record and despite the fact that any action under the Commission's interim licensing policy granting a license relating to the commercial use of mixed oxide fuel would be subject to judicial review on a full record, that issuance of such a license would, under every circumstance, violate NEPA.

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[4] The Second Circuit also issued on September 8, 1976 orders denying timely suggestions for rehearing en banc. Those orders are set forth as AGNS Appendix D.

STATUTES INVOLVED

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970);

2. Section 103 and section 161b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2133 and § 2201(b) (1970).

The statutes cited above are set forth in AGNS Appendix E.

STATEMENT OF THE CASE

All but one of the commercial nuclear power reactors operating or under construction in the United States are cooled by ordinary, or "light," water and presently use uranium fuel which has been enriched in a fissile, or energy-producing, isotope, uranium-235, to about 3 percent of the total fuel content. Plutonium, which is also fissile, is a natural and inevitable by-product of the operation of these reactors.[5] The concept of "plutonium recycle" with mixed (uranium-plutonium) oxide fuel in light water reactors embraces the series of steps needed to permit substitution of plutonium for a portion of the uranium-235 that would otherwise be used in reactor fuel.[6] Plutonium recycle permits conserva-

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[5] Plutonium is "bred" over the course of the normal reactor chain reaction from basically non-fissile uranium isotopes, primarily uranium-238, which represent about 99% of naturally occurring (unenriched) uranium and about 97% of the uranium used in present light water reactor fuel. This "bred" plutonium in turn fissions, producing a significant proportion of the total power developed over a uranium fuel core's life and approximately 50% of the power being generated at the end of core life.

[6] The production and use of mixed oxide fuel involve several steps, which are described in detail in the Commission's Notice, AGNS Appendix A, pp. A-12 - A-13. In essence, they are: reprocessing spent reactor fuel to separate out plutonium from other

tion of uranium-235, as well as efficient disposition of spent reactor fuel.

The Atomic Energy Commission[7] first announced its intent to publish a generic environmental statement dealing with the wide-scale use of mixed oxide fuel on February 12, 1974 (39 Fed. Reg. 5356). The announcement indicated that the AEC was preparing a Generic Environmental Statement on the Use of Mixed Oxide Fuel in Light Water Reactors (GESMO) pursuant to the requirements of NEPA and the Council on Environmental Quality's Guidelines (40 C. F. R. Part 1500), and that if the GESMO warranted, the AEC would propose amendments to its regulations to deal with the wide-scale use of such fuel. A draft of the GESMO was completed and made publicly available on August 21, 1974 (39 Fed. Reg. 30186).

In May 1975, the Commission announced that before making a decision on wide-scale use of mixed oxide fuel in light water reactors, it would require its Staff to perform certain additional analyses, including a cost-benefit assessment of alternative safeguards pro-

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constituents; converting the plutonium into a chemically useful (oxide) form; fabricating new fuel rods using plutonium in place of a portion of the uranium-235 that would otherwise be needed; and use of such fuel rods in a light water reactor, exactly like pure uranium fuel. These steps are carried out at a series of coordinated facilities, each of which must be licensed, along with any necessary transportation links, pursuant to the Atomic Energy Act of 1954, as amended, and NEPA. Each of these steps, including reactor operation with mixed oxide fuel, has already been demonstrated on a small scale.

[7] The Atomic Energy Commission (AEC) was abolished, and the Nuclear Regulatory Commission was created and succeeded on January 19, 1975 to the regulatory functions of the AEC, under the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (Supp. V, 1975).

grams, which would be reflected in both draft and final environmental statements (40 Fed. Reg. 20142, May 8, 1975). At the same time, the Commission announced its provisional views on the issuance of licenses for activities related to the production or use of mixed oxide fuel pending the outcome of its decision on wide-scale use. The November 1975 notice detailing the Commission's interim licensing policy was issued in response to comments received on its May 1975 provisional views.

In the November 1975 notice, the Commission analyzed the differing relationships of the various types of facility licensing proceedings to wide-scale use of mixed oxide fuel. It found that interim licensings, individually or collectively, would not necessarily result in the foreclosure of significant health and safety or environmental alternatives.

The Commission made clear that any facilities so licensed must, of course, meet all applicable health, safety, and environmental requirements, and that any licenses issued would be expressly subject to amendment, suspension or revocation in light of its ultimate decision on wide-scale use of mixed oxide fuel. Like all licenses issued by the Commission, any such license would be reviewable in the Court of Appeals. Further, the Commission stressed that such individual determinations, for all facilities other than power reactors, would be made only after balancing three additional eligibility criteria:[8]

> (1) Whether the activity can be justified, from a NEPA cost-benefit standpoint, without placing

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[8] The Commission found that use of mixed oxide fuel by power reactors would in no way tend to predetermine the outcome of its generic decision and involved no other special limiting considerations. AGNS Appendix A, pp. A-21 - A-22, A-26.

> primary reliance on an anticipated favorable Commission decision on wide-scale use of mixed oxide fuel;
>
> (2) Whether the activity would give rise to an irreversible and irretrievable commitment of resources that would unjustifiably foreclose for the activity substantial safeguards alternatives that may result from the decision on wide-scale use; and
>
> (3)The effect of delay in the conduct of the activity on the overall public interest.

AGNS Appendix A, pp. A-25 - A-26.

The November 1975 notice and the extensive record on which it was based demonstrate that the Commission, in establishing its interim licensing policy, considered and balanced a broad range of factors. These include protection of the public health and safety, the need to avoid foreclosure of safeguards alternatives, protection of the environment and retention of environmental alternatives, conservation of scarce natural resources, impact on the nation's energy development program, and the need for a flexible regulatory process. As the notice itself states:

> In reaching its general conclusion that individual interim licenses may be issued where warranted, and under the specific conditions discussed in this notice, the Commission assessed the likely benefits of allowing such interim licensing as well as the possible adverse impacts. Here, as in other decisional areas, the need for careful balance was evident. While the Commission is properly mindful that certain licensing actions have the potential for foreclosing subsequent alternatives, it cannot disregard the equally hard reality that inaction or a blanket prohibition on fuel recycle related licensing actions could also foreclose or substantially

impede realization of energy alternatives which may contribute significantly to meeting national needs.

* * *

Broad public interest considerations must be weighed in determining the appropriateness of interim licensing. Whether the Commission decision on wide-scale use of mixed oxide fuel is favorable or unfavorable, an absolute prohibition on the conduct of any related activities in the interim could result in the disruption or cessation of planning as well as the production of useful data. Such a prohibition could result in potentially serious delays in exploring alternatives which could contribute to meeting the nation's energy needs. This could impose future economic penalties on the American public through increased costs to electric utilities caused by delaying the use of resources available in spent fuel and requiring additional spent fuel storage facilities that otherwise would not be needed.

AGNS Appendix A, pp. A-22, A-23 - A-24.

Dissatisfied with the Commission's considered determination that a complete moratorium on the licensing of commercial mixed oxide activities would be inconsistent with the public interest, Natural Resources Defense Council (NRDC)[9] and the Attorney General of the State of New York filed similar petitions for review in the Second Circuit, asserting jurisdiction in the Court of Appeals pursuant to 28 U.S.C. § 2342(4) (Supp. V, 1975) and 42 U.S.C. § 2239 (1970). Both petitions contested the legality, under NEPA, of the Commission's decision not to impose a licensing mora-

[9] Five other groups—Sierra Club, Inc., Environmentalists, Inc., West Michigan Environmental Action Council, Inc., National Intervenors, Inc and Businessmen for the Public Interest, Inc.—joined in the petition for review filed by NRDC.

torium on commercial mixed oxide fuel activities pending completion of the GESMO proceeding.[10] The Commission and various intervenors before the Second Circuit, including Baltimore Gas and Electric Company, *et al.*, and The Babcock & Wilcox Company, opposed this argument and raised, with respect to review of the Commission's interim licensing policy, questions of finality and ripeness.

The Second Circuit, rejecting the objections concerning lack of finality and ripeness, concluded that the interim licensing policy inherently violated NEPA in that it would "circumvent the mandates of NEPA by granting interim licenses on the basis of records which exclude the generic aspects." AGNS Appendix B, p. A-71. In short, the court below held that the Commission must refrain from issuing any licenses related to use of mixed oxide fuel on a commercial scale "until the GESMO and the GESMO supplement have been issued in final form and until the Commission has made its final decision on wide-scale use of mixed oxide fuel." AGNS Appendix B, p. A-72. Petitions for rehearing were denied with a supplemental opinion primarily seeking to distinguish this Court's intervening decision in *Kleppe* v. *Sierra Club*, 96 S.Ct. 2718 (June

[10] NRDC and New York also contended that the full panoply of adjudicatory procedures normally associated with "on the record" hearings conducted pursuant to sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1970), should be required in the Commission's rulemaking hearing, and complained of various other aspects of the rulemaking's structure and conduct. The Second Circuit rejected these arguments and Petitioners do not seek review of these aspects of the court's decision.

28, 1976. AGNS Appendix C. Suggestions for rehearing en banc were also denied. AGNS Appendix D.[11]

REASONS FOR GRANTING THE WRIT

The Second Circuit's opinion presents this Court with a clear example of a case worthy of certiorari.[12]

First, in rejecting the Commission's interim licensing policy for a potentially major energy source the Second Circuit has departed from established principles of law in an area of paramount importance to the national welfare.

The close historic correlation between economic production and energy use shows no sign of breaking down; nor does the crucial role of electricity in providing energy to all sectors of this nation's economy. As

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[11] The Commission's public hearings connected with the GESMO rulemaking began on November 30, 1976, with the start of questioning by the Hearing Board of the first witness panel, the Commission's Staff, on its direct testimony. Filing of direct testimony by other full participants, of which there are over seventy, and subsequent questioning thereon will not begin until early next year. The present quasi-legislative phase of the proceeding may eventually be succeeded in some areas by adjudicatory procedures upon a proper showing of need. Although the duration of such proceedings is virtually impossible to predict, it seems not unlikely that compilation of the hearing record alone will take at least one to two more years. At that time, it will be certified to the Commission for a decision, which, in view of the complexity of the matter, will certainly not be rendered overnight.

[12] Allied-General Nuclear Services, *et al.*, in their petition in Supreme Court Docket No. 76-653, have aptly set forth the reasons why this Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit in this proceeding. We subscribe to and incorporate by reference the statement of reasons set forth by Allied-General Nuclear Services, *et al.*, and merely summarize here certain aspects which deserve especially close attention.

the events of the past few years have clearly illustrated, economic sources of energy at present are either limited in their available supply or beset by use-related problems. Whatever their problems, however, domestically available sources of energy possess important advantages over ones which must be imported. The nation's present energy posture is a precarious one and no potential source of energy, however exotic, can be overlooked for development. It is all the more vital, therefore, that the opportunity for commercial harnessing of known, readily available energy supplies in the near-term future should not be pre-emptively stifled by mechanical misapplication of NEPA doctrine.

The Second Circuit's bar on the issuance of individual commercial licenses pending the completion of what is expected to be a lengthy generic proceeding could greatly exacerbate the spent fuel storage problems already being experienced by some utilities and increase the demand for scarce uranium. More important, however, because of the advance planning and long lead times involved in the construction of fuel cycle facilities, the Second Circuit's ban on interim licensing could also result in the unavailability of the mixed oxide fuel option at a critical juncture.

Second, the Second Circuit's opinion is clearly contrary to this Court's decision in *Kleppe* v. *Sierra Club*, 96 S.Ct. 2718 (June 28, 1976). In *Kleppe*, this Court, reversing the United States Court of Appeals for the District of Columbia Circuit, found no requirement for a general impact statement covering coal development plans in the Northern Great Plains region and held that, even assuming the need for such a regional impact statement, an injunction against interim mining activities in the region was improper. 96 S.Ct. at

2733 n. 26. *Accord, Aberdeen & Rockfish R.R. Co.* v. *SCRAP*, 422 U.S. 289 (1975). An impact statement had been prepared on four mining plans in one basin within the Northern Great Plains region, and the adequacy of that statement "had not been challenged either before the District Court or the Court of Appeals, in this case, or anywhere else." 96 S.Ct. at 2729. Thus, this Court held that so long as the individual impact statement covering those specific projects was adequate, there was no reason to enjoin the projects' approval pending completion of a regional impact statement. 96 S.Ct. at 2729 n. 16. This would have been true, the Court held, even if a regional impact statement would ultimately have been required, so long as the individual statement adequately "analyzed the environmental impact of, and the alternatives to, the proposal" within its ambit. *Id.*

This Court in *Kleppe* also considered a contention that a regional impact statement was needed because coal projects in the area were intimately related to each other, an argument similar to the Second Circuit's apparent belief that activities which might be undertaken prior to the completion of the GESMO proceeding would automatically be tied to the wide-scale use of mixed oxide fuel. The Court noted that this argument could be viewed as an attack on the sufficiency of impact statements for individual projects, and that "[a]s such we cannot consider it in this proceeding, for the case was not brought as a challenge to a particular impact statement and there is no impact statement in the record." 96 S.Ct. at 2730. Additionally, even where a comprehensive statement would ultimately be necessary, interim approvals of individual projects may be allowed on the basis of adequate

individual statements where "approval of one [project] does not commit the Secretary to approval of any others. . . ." 96 S.Ct. at 2733 n.26.

The opinion below predated *Kleppe*. Nonetheless, when apprised in petitions for rehearing of this Court's decision in that case, the Second Circuit denied the petitions on the ground that *Kleppe* was distinguishable and therefore not controlling. AGNS Appendix C, pp. A-75 - A-76.

The Second Circuit attempted to distinguish *Kleppe* by asserting that any individual impact statements "drafted in accordance with presently existing Commission rules and precedent would necessarily result in impact analyses inadequate under NEPA." AGNS Appendix C, p. A-76. Yet this preclusive judgment was rendered in the absence of any Commission impact statement relating to a particular facility, and thus is directly contrary to the views set forth by the Court in *Kleppe*. 96 S.Ct. at 2730.

The Second Circuit attempted to distinguish *Kleppe* on a second, equally invalid basis. It asserted that unlike the individual leases at issue in *Kleppe*, the individual interim licensing to which the Commission's procedures would give rise would be "clearly tied" to the anticipated wide-scale use of mixed oxide fuel and thus "would commit substantial resources to the mixed oxide fuel technology." AGNS Appendix C, p. A-76. In fact, however, as the Commission and other parties explained to the Second Circuit in briefs below, the operation of certain facilities would not necessarily be dependent upon wide-scale use of mixed oxide fuel. Indeed, the Commission's eligibility criteria would sharply limit, if not eliminate, the interim licensability of any activities not possessing such independent util-

ity. Thus, the Second Circuit simply was wrong in holding that *Kleppe* is not controlling in this case.

Third, the decision of the court below is at odds with other appellate decisions which affirm the right of an agency to proceed with adjudications while related rulemakings are in progress. *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 590-593 (1968); *F.C.C.* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949); *Pikes Peak Broadcasting Co.* v. *FCC*, 422 F.2d 671, 680 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 979 (1969). This principle has been affirmed in cases in which the rulemaking is, as in this case, undertaken pursuant to NEPA and public interest concerns dictate that some adjudications go forward. *Aberdeen & Rockfish R.R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *Nader* v. *NRC*, 513 F.2d 1045 (D.C. Cir. 1975); *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069 (D.C. Cir. 1974).

Finally, the decision below is erroneous in that it was made prematurely and without an adequate basis in fact. The Second Circuit, describing the Commission's interim licensing criteria as "at best vague and at worst disingenuous," AGNS Appendix B, p. A-66, apparently *assumed* that the criteria would be improperly applied and that, consequently, any interim licenses which might be granted would inevitably "tip the scale towards a favorable final decision on wide-scale use [of mixed oxide fuel]." AGNS Appendix B, pp. A-69 - A-70. The Second Circuit's holding that the Commission would misapply its own interim licensing standards is directly contrary to the presumption of regularity which this Court has recognized as attaching

to agency action. *F.C.C.* v. *Schreiber,* 381 U.S. 279, 296 (1965).

The Second Circuit's holding was both speculative in the extreme and particularly inappropriate in the context of this case. Not only did the court not stay its hand until it could have before it a Commission decision in which the interim licensing criteria had actually been applied, but the record before it contained no environmental impact statement prepared with regard to any individual interim license application. In these circumstances the Second Circuit's decision to presume the outcome of future individual licensing requests violated the standards for judicial restraint set forth by this Court in *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158 (1967).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.[13]

Respectfully submitted,

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[13] Indeed in view of the fundamental inconsistency of the Second Circuit's holding with the decision of this Court in *Kleppe*, the opinion below strongly merits summary reversal. *See, e.g.*, Coleman v. Conservation Society of Southern Vermont, 423 U.S. 809 (1975); Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League, 423 U.S. 12 (1975).

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REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

This reply memorandum is being filed by petitioners[1] pursuant to Rule 24(4) of the rules of this Court, in response to a matter first raised in the Opposition of Respondents Natural Resources Defense Council, *et al.* to the petitions for certiorari in this and related cases (Nos. 76-653, 76-762, 76-769).

Respondents Natural Resources Defense Council, *et al.* (NRDC) attempt to distinguish this Court's opinion in *Kleppe* v. *Sierra Club*, ... U.S. ....., 96 S.Ct. 2718 (1976)

[1] Baltimore Gas and Electric Company, Boston Edison Company, Consumers Power Company, Duke Power Company, Long Island Lighting Company, Northeast Nuclear Energy Company, Pacific Gas and Electric Company, Philadelphia Electric Company, Public Service Electric and Gas Company, Southern California Edison Company, The Connecticut Light and Power Company, The Hartford Electric Light Company, Virginia Electric and Power Company, Western Massachusetts Electric Company and Yankee Atomic Electric Company, and The Babcock & Wilcox Company.

principally by arguing that the criteria proposed by the Nuclear Regulatory Commission (NRC) for use in interim licensing activities prior to completion of its generic GESMO rulemaking[2] are inherently deficient because they would inevitably exclude relevant GESMO issues. NRDC Br. in Opposition at 18-21. A central element in their argument (NRDC Br. in Opposition at 10, 14-15, 20) is that the NRC's memorandum decision in the *Big Rock Point* reactor licensing case, *Consumers Power Company* (Big Rock Point Nuclear Plant), CLI-75-10, 2 NRC 188 (August 11, 1975), necessarily precludes proper consideration of relevant GESMO issues in individual interim licensings.

NRDC's reliance on *Big Rock Point* is flatly misplaced. First, the order in that case issued on August 11, 1975—three months to the day before the November 11, 1975 notice which forms the basis of this lawsuit. It also was directed to one licensing amendment for one reactor, whereas the November 11 notice applied generally to all licensing of all recycle-related facilities. Thus *Big Rock Point* cannot be used either to illustrate or to qualify the November 11 notice as a statement of NRC policy, and the reliance of both NRDC and the Court of Appeals to this effect is simply unjustified.

Second, even if *Big Rock Point* were not inherently irrelevant to the issues in this case, it would still be completely distinguishable from it. *Big Rock Point* is a highly fact-dependent decision, in a situation where specific facts were crucial. In considering whether to permit the *Big Rock Point* proceeding to take place prior to completion of the GESMO proceeding, the Commission noted that the Big Rock reactor is one of the smallest currently operating re-

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[2] Generic Environmental Statement on Mixed Oxide Fuel, NRC Docket No. RM-50-5.

actors, and that it had already been using mixed uranium and plutonium oxide fuel successfully in its core for six years on an experimental basis. The action being considered by the Commission was authorization to increase the amount of plutonium in the fuel being used at the plant.

The Commission specifically found that the requested authorization "would not in any sense give rise to wide-scale use of mixed oxide fuel[;] would result in no unnecessary 'grandfathering'[; and would not] foreclose future safeguards options or future operational alternatives at the Big Rock facility."[3] 2 NRC at 190. It was under the highly specific circumstances of a licensing which the Commission found to have no generic impact, that it permitted a NEPA review of a "scope . . . tailored to the possible environmental impact resulting from increasing the amount of plutonium in this one reactor." *Id.*

Accordingly, the Commission concluded that the Big Rock Point licensing need not await completion of the generic GESMO proceeding or "cover the same ground being covered there, where the concern is with the *wide-scale* use of mixed oxide fuel." *Id.* (Emphasis in original.) Such tailoring of the scope and timing of proceedings in view of the circumstances actually posed by them is the process envisaged by this Court in *Kleppe, supra,* ..... U.S. at ....., 96 S.Ct. at 2730 note 20, 2733 note 26.

In short, *Big Rock Point* governs only the "unique circumstances," 2 NRC at 191, addressed by it. The case, most certainly, cannot be used to support the proposition that all arguably generic GESMO issues would necessarily be excluded, under the terms of the November 11 notice, from all individual interim licensing proceedings regardless of

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[3] Indeed, the Commission concluded, 2 NRC at 190, that the particular license amendment sought would not foreclose safeguards or operational alternatives, either at Big Rock Point or anywhere else.

the character or purpose of the facility or of the license being sought for it.[4]

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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[4] Respondents' unsuccessful effort to predict the scope of future environmental analyses is apparently designed to demonstrate that interim licenses could be issued without adequate protection of the public. But as the Commission has repeatedly emphasized (*see, e.g.*, Memorandum for the United States at 10), no interim license could issue unless the provisions of the Atomic Energy Act and the National Environmental Policy Act, *inter alia*, were met, thus assuring that the public health and safety and the environment will be protected. Moreover, if any interim license is issued, judicial review can take place at that time, when the relevant environmental analysis, rather than respondents' speculation, would be before the Court.